

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TODD HATFIELD,

Petitioner,

v.

CASE NO. 2:08-CV-1152
JUDGE HOLSCHUH
MAGISTRATE JUDGE KING

WARDEN, ROSS CORRECTIONAL
INSTITUTION,

Respondent.

OPINION AND ORDER

On May 3, 2010, the Magistrate Judge issued a *Report and Recommendation* recommending that the petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be dismissed. Doc. No. 15. This matter is now before the Court on the objections to that *Report and Recommendation*.

Petitioner objects to the Magistrate Judge's recommendation of dismissal of his sole claim for federal habeas corpus relief, *i.e.*, that the trial court's imposition of consecutive terms of incarceration after the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1 (2006), violates due process. Plaintiff again raises all of the same arguments that he previously presented. He contends that neither *Oregon v. Ice*, 129 S.Ct. 711 (2009), nor *Hooks v. Sheets*, – F.3d –, 2010 WL 1655578 (6th Cir. April 27, 2010), preclude him from obtaining relief on this claim.

Pursuant to 28 U.S.C. §636(b), this Court has conducted a *de novo* review. For the reasons already detailed in the Magistrate Judge's *Report and Recommendation*, this Court is not persuaded by petitioner's arguments. Petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**.

Petitioner also requests a certificate of appealability and leave to proceed on appeal *in forma pauperis*. See *Objections*.

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). In order to make such a showing, a petitioner must show

that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'"

Slack v. McDaniel, 529 U.S. 473, 484 (2000)(quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). This Court is persuaded that reasonable jurists could debate whether petitioner's claim should have been resolved differently. Therefore, petitioner's request for a certificate of appealability is **GRANTED**. The Court **CERTIFIES** the following issue for appeal:

Did the trial court's imposition of consecutive terms of incarceration after the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St. 3d 1 (2006), violate due process?

Petitioner has also asked for leave to proceed on appeal *in forma pauperis*, but has not provided any financial information in support of that request. Petitioner shall have 21 days to file a motion for leave to proceed *in forma pauperis* with appropriate

documentation. Petitioner is advised that his failure to do so may result in the dismissal of his appeal. **The Clerk is DIRECTED to provide petitioner the appropriate form..**

This action is hereby **DISMISSED**.

The Clerk shall enter **FINAL JUDGMENT**.

Date: May 28, 2010

/s/ John D. Holschuh
JOHN D. HOLSCHUH
United States District Judge